Supreme Court, U.S.
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CASE

IN THE

SUPREME COURT of the

UNITED STATES

OCTOBER TERM, 1994

TENKASI M. VISWANATHAN,
Petitioner

v.

THE MISSISSIPPI COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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11pp

QUESTIONS PRESENTED

1. The Arkansas Administrative Procedure Act **(APA)** in Sections **25-15-210(c), and 25-15-212(b)** defines two classes of petitioners for judicial review on whom service of a governmental agency's decision is effected. The two manners of service are personal service and service by mail. If service is complete upon mailing, then **will not the APA, Section 25-15-210(c) be unconstitutional** under the **Equal Protection and Due Process Clauses of the Fourteenth Amendment** to the **United States constitution?**

2. The Arkansas Supreme Court ruled that the discharge of an employee is an administrative decision and that "the APA, **Section 25-15-212(a)** is not applicable to the discharge of an employee." The Arkansas Supreme Court then concluded that the Circuit Court was without subject matter jurisdiction to entertain an

employee's petition for judicial review. If the Ark. Code Ann., Section 25-15-212(a) on judicial review of agency actions is construed in this way without considerations of property and liberty rights of employees, would it not be unconstitutional under one or other of the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

3. Pursuant to APA, Section 25-15-210(b)(2), an agency's final decision "shall include findings of fact and conclusions of law, separately stated". Pursuant to APA, Section 25-15-210(b)(1), "a final decision or order shall be in writing or stated in the record.", and pursuant to Section 25-15-210(c), "Parties shall be served either personally or by mail with a copy of any decision or Order." If the copy that is served pursuant to subsection (c) above does not meet the mandatory requirements of

subsection (b)(2), then is not the final agency action unconstitutional under the Due Process Clause of the Fourteenth Amendment?

4. If, in a public institution, the Grievance Committee is a Committee of the Chief Executive Officer (CEO) and his Cabinet, and reports its investigations to the CEO, will not this grievance procedure be unconstitutional, if the grievance is against the very CEO and members of the Cabinet, of whose committee the Grievance Committee is? Would not the procedure that the Grievance Committee report to the CEO and the Cabinet render the grievance process meaningless and devoid of substance, and thus unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

LIST OF PARTIES

A list of all parties to the proceeding in the Circuit Court is included in the caption. This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioner.

Petitioner respectfully recites that the constitutionality of sections of the Arkansas Administrative Procedure Act and of a regulation of the Mississippi County Community College is drawn into question in this proceeding, and that U.S.C., Section 2403(b) may be applicable. The Arkansas Supreme Court did not certify to the state attorney general this fact.

TABLE OF CONTENTS

Questions Presented . . . . . (i)

List of Parties . . . . . (iv)

Table of Contents . . . . . (v)

Table of Authorities . . . . . (vi)

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutory Recitations . . . 8

Statement of the Case 17

Federal Questions 27

Reasons for Granting 40

Argument 42

Conclusion 71

Appendix:

Opinion Delivered by the Supreme Court of Arkansas per Justice Steele Hays entered December 5, 1994 . 1a

Order on Rehearing by the Supreme Court of Arkansas entered January 17, 1995 . 7a

Order by the Circuit Court of Pulaski County per David B. Bogard, Circuit Judge entered December 6, 1993 . . . . 8a

Order by the Circuit Court of Pulaski County per David B. Bogard, Circuit Judge entered December 28, 1993 . . . . **9a**

Regulation from the Mississippi County Community College Academic Staff Handbook 1992-93 on Grievance Procedure **11a**

Regulation from the Mississippi County Community College Academic Staff Handbook 1992-93 on Grievance Committee **15a**

Regulation from the Mississippi County Community College Academic Staff Handbook 1992-93 on Termination of Faculty Appointment . . . . . **16a** . . . .

Final Decision of the Board of Trustees of Mississippi County Community College per letter of Bill Ross, Chairman, Board of Trustees, dated October 20, 1993 . . . . . **18a**

Decision of Dr. John Sullins, President of Mississippi County Community College dated September 8, 1993 . . . **19a**

TABLE OF AUTHORITIES

Alfred v. Little Rock School District, 274 Ark. 414, 418, 625 S.W.2d 487, 489 (1981) **32**

American Const.Co.v. United States, 107 F.Supp. 858 (U.S.C.C., 1952); Cert. denied, 345 U.S. 922, 923; 97 L.ed. 1354 . . . . . **60**

Amer. Jur. Prud., 42, p.664 . . . . . **48**

Ark. Code Ann. Section 21-4-203 . . **34, 35**

Ark. Code Ann., Section 25-15-201 . **10, 74**

Ark. Code Ann. Section 25-15-202 . **10, 35**

Ark. Code Ann. Section 25-15-210 . **9, 13, ... 24, 27, 28, 29, 40, 55, 58**

Ark. Code Ann. Section 25-15-212 . . **5, ... 22, 23, 26, 30, 35, 36, 39, 43, 48, ...64, 3a, 10a**

Arkansas Livestock and Poultry Comm'n v. House, 276 Ark. 326, 634 S.W.2d 388 (1982) **33, 4a**

Ark. Rules of Civil Procedure, Rule 5 . **28**

Arkansas Teacher Fair Dismissal Act, Ark. Code Ann. Section 80-1264.3, .4, .8, recodified . **34**

Arnett v. Kennedy, 416 U.S.167. **37, 38, 46**

Batten v. N.C. Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990) **56**

Bixby v. Pierno, 4 Cal. App. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242 (1971) . **56**

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). **31, 34**

Boddie v. Connecticut, 401 U.S. 371, 380 (1971) . . . . . **.31, 35, 37, 38, 46, 47**

Burgess v. Board of Education (1974) 41 Cal. App. 3d 571, 577, 116 Cal. Rptr. 183 . . . . . **52**

Buttrey v. United States, 690 F.2d 1170, 1178 (5th Cir. 1982), cert. denied, 461 U.S. 927, 103 S.Ct. 2087, 77 L.ed. 2d 298 (1983) **69**

Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987) **56**

Compton v. Board of Trustees (1975) 49 Cal. App. 3d 150, 154, 122 Cal. Rptr. 157 . . . . . **52**

Connell v. Higginbotham, 403 U.S. 207 . **31**

Constitutional Amendment Fourteen . . . **8**

Evers v. Pender County Bd. of Educ., 104 N.C. App. 1, 407 S.E. 2d 879, aff'd 331 N.C. 380, 416 S.E. 2d 3 (1992) **56**

Feist v. Rowe, 3 Cal. Appl.3d 404, 83 Cal. Rptr. 465 (1970), dealing with reemployment of a probationary teacher. **53**

Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988) . . . **69, 70**

Hilton v. PineBluff Public Schools, 796 F.2d 230 (8th Cir. 1986) **31, 33**

James v. Strange, 407 U.S. 128 (1972) **29, 59**

Koons v. Placer Hills Union School District, 132 Cal. Rptr. 243, 61 Cal. App.3d 484 (1976) **39, 51, 54, 62**

Lindsey v. Normet, 405 U.S. 56 (1972) **29, 59**

Logan v. Zimmerman Brush Co. et al., 455 U.S. 422 (1982)**29, 30, 35, 37, 46, 50, 59**

Lucas v. Board of Education, 13 Cal.3d 674, 678 119 Cal. Rptr. 462 . . . . **55, 60**

Martinez v. California, 444 U.S. 277 (1980) **36, 43, 48**

Martino v. Concord Community Hospital Dist., and 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965) **54**

Mathews v. Eldridge, 424 U S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976) **66, 69**

McElroy v. Jasper School District, 273 Ark. 143, 147, 617 S.W.2d 356, 358 (1981) **32**

McNair v. McNair, 316 Ark. 299, 870 S.W.2d 756 (1994). **6**

Meyers v. Dep't of Human Resources, 105 N.C. App. 665, 415 S.E.2d 70 (1992). . **56**

Mississippi County Community College Academic Handbook 1992-93 . . . . . **33, 11a, 15a, 16a**

Morissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). **66, 69**

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) **4, 30, 36, 41, 43, 47**

N.C. G.S., Sections of Chapter 150B **10, 13, 15, 16**

Richardson v. United States, 86 F.Supp. 1019, 114 Ct.Cl. 695, 701 . . . . . **61**

Rinaldi v. Yeager, 384 U.S. 305 (1966). **29, 59**

Rogers v. Masem, 788 F.2d 1288
(8th Cir. 1985) **4, 31, 33, 34, 41, 44, 45**

Rules of the Supreme Court Rules 10.1(b),
10.1(c) **3, 4, 7, 40, 41**

Rutherford v. Board of Trustees,
37 Cal. App.3d 775,
112 Cal. Rptr. 560 (1974) **53**

Schweiker v. Wilson,
450 U.S. 221 (1981) **29, 59**

Skelly Oil Co. v. Phillips Co., 339 U.S.
667, 70 S.Ct. 876, 881,
94 L.Ed. 1194 . . . . . **7, 60, 62**

Societe Internationale v. Rogers,
357 U.S. 197 (1958) **36, 43, 47**

Stafford v. City of Hot Springs, 276 Ark.
466, 637 S.W.2d 553 (1982). **4**

Thompkins v. Stuttgart School Dist. No.
22, 858 F.2d 1317 (8th Cir. 1988). . . **34**

United States v. Ritchie, 17 How. 525,
533, 541, 15 L.ed. 236 . . . . . **49**

Vitek v. Jones, 445 U.S. 490 . **37, 38, 46**

Ward v. Fremont Unified School Dist., 276
Cal. Appl.2d 313,
80 Cal. Rptr. 815 (1969) **53**

Warren v. New Hanover County Bd. of Educ.,
104 N.C. App. 522,
410 S.E.2d 232 (1991) **56**
Withrow v. Larkin, 421 U.S. 35, 46-47,
95 S.Ct. 1456, 1464,
43 L.Ed.2d 712 (1975). **70**

Wright v. Arkansas State Plant Board, 311
Ark. 125, 842 S.W. 2d 42 (1992) **11a**

TO:

The Honorable Chief Justice of The United States, and

The Honorable Associate Justices of the Supreme Court of the United States:

Tenkasi M. Viswanathan, Petitioner-Appellant in the above-captioned civil proceeding before the Arkansas Supreme Court, respectfully petitions the Supreme Court of the United States and prays that a writ of Certiorari issue to review the opinion delivered of the Supreme Court of Arkansas and the following **Orders** of the said Supreme Court as well as those listed below of the Circuit Court of Pulaski County, Arkansas, the Honorable Judge David Bogard.

OPINIONS BELOW

The **Opinion Delivered** of the Supreme Court of Arkansas was entered on December

5, 1994. The Order of the Supreme Court of Arkansas denying Petition for Rehearing was entered on January 17, 1995. The opinion and the order appear in the Appendix herein.

The Order of the Circuit Court of Pulaski County, Arkansas, denying Petitioner's motion to grant enlargement of time to petition for judicial review was entered on December 6, 1993. And, the Order of the Circuit Court of Pulaski County, AR, denying Petitioner's motion for reconsideration of the December 6, 1993-Order was entered on December 28, 1993. The two orders appear in the Appendix herein.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States on the following grounds:

(i) This is an original petition for a writ of certiorari; this is not a cross-petition.

(ii) (1) The jurisdiction of the Supreme Court of the United States to review the **Orders** in question by writ of certiorari is conferred by Rule 10.1(b) of the Rules of the Supreme Court, this being a proceeding involving a decision of the Arkansas Supreme Court in conflict with decisions of the highest courts of last resort of North Carolina, of California, of Delaware, and of other states. The Arkansas statutes are not very different from Administrative Procedure Acts of several states among which are North Carolina, California, Delaware, and Florida.

(2) The decision of the highest court of Arkansas of last resort is also in conflict with a decision of the United States Court of Appeals for the Eighth

Circuit, a decision holding that a [probationary] teacher of Arkansas had a property right in his [probationary] employment and that he was deprived of his property without due process of law. Rogers v. Masem, 788 F.2d 1288, 1289, 1291 (8th Cir. 1985).

(iii) Jurisdiction of the Supreme Court of the United States is also conferred by Rule 10.1(c) of the Rules of the Supreme Court of the United States, this being a proceeding involving a federal question, which the Arkansas Supreme Court has decided in a way that conflicts with applicable decisions of this Court, beginning with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

In light of the holdings of this Court, of the various state courts and the United States Courts of Appeals, the decision of the Arkansas Supreme Court in

the present case interpreting the Arkansas Statute, Ark. Code Ann., Section 25-15-212(a) is unconstitutional. The Arkansas administrative statute, Ark. Code Ann., Sections 25-15-212(a), construed as it is by the Arkansas Supreme Court appears to be unconstitutional under the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The Arkansas Supreme Court in its Opinion stated that "[i]t hardly need to be said that firing employees is clearly an administrative act and not a matter that involves the quasi judicial function of an agency." Opinion at 3. The Arkansas Supreme Court further stated that ". . . assuming that the Administrative Procedure Act even applies to a decision made by the Board of Trustees [the respondent] the discharge of an employee is an administrative

decision." Opinion at 3. "We hold that the APA (The Arkansas Administrative Procedure Act, **Ark. Code Ann., Section 25, subchapter 2)** is not applicable to the discharge of an employee . . .." Opinion at 1. ". . . we find that the circuit court was without subject matter jurisdiction". Opinion at 4.

On the other hand, several decisions of the Supreme Court of the United States and of other courts have held that there are circumstances, where employment confers property right and liberty rights and so there ought to be adjudication in such cases involving notice, and some kind of hearing. The denial of adjudication when one exists or the absence of a due process of adjudication when one ought to exist are all held to be repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(iv) This Court has jurisdiction to resolve the conflict arising from these opposite holdings.

(v) Jurisdiction of this Court is also conferred by Rule 10.1(c), since the right to litigate is a fundamental liberty and property right and is intimately connected with procedures. As such this right to litigate is a federal question. Time for filing is one element of procedure controlling this federal question. The question of computation of time and how time runs after a notice is served upon a petitioner or party are questions that have been decided by this Court in Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 676, 70 S.Ct. 876, 881, 94 L.Ed. 1194. The Circuit Court of Pulaski County has decided this question in a way that is in conflict with the cited decision of this Court.

(vi) The Arkansas statute Ark. Code Ann., Section 25-15-210(c) setting out how service of an administrative order is to be made, if construed in light of the order of the Circuit Court of Pulaski County is unconstitutional, being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Constitutional Provisions and Statutory Recitations . . . . ..

The following is a verbatim rendering of the constitutional provisions, statutes and regulations involved in the case, giving the appropriate citation therefor:

(1) Constitutional Amendment Fourteen

Section 1. . . . No State shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) **Ark. Code Ann.**
SUBCHAPTER 2 --- ADMINISTRATIVE PROCEDURE ACT

(3) Ark. Code Ann., Section 25-15-201. Title.

This subchapter shall be known and cited as the "Arkansas Administrative Procedure Act".

(4) **Ark. Code Ann. Section 25-15-202. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Agency" means each board, commission, department, officer, or other authority of the government of the State of Arkansas, whether or not within, or subject to review by, another agency, except the General Assembly, the courts, and Governor;

(2) "Person" means any individual, partnership, corporation, association, or public or private organization of any character;

(3) "Party" means any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding;

(4) "Rule" means any agency statement of general applicability and

future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of any agency;

(5) "Rule making" means agency process for the formulation, amendment, or repeal of a rule;

(6) "Order" means the final disposition of an agency in any matter other than rule making, including licensing and rate making, in which the agency is required by law to make its determination after notice and hearing;

(7) "Adjudication" means agency process for the formulation of an order;

(8) "License" includes any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;

(9) "Licensing" means any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, or amendment of a license.

(5) North Carolina General Statutes, Section 150B-2. Definitions.

(1) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and

any other unit of government in the executive branch.

(2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty.

(3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(5) "Party" means any person or agency named or admitted as a party, and includes the agency as appropriate. . . . .

(6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

(7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated

association, organization, or society which may sue or be sued under a common name.

(6) California Code, Section 11500.

(a) "Agency" includes the state boards, commissions and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, ...

(b) "Party" includes the agency, the respondent and any person, . . . ,who has been allowed to appear or participate in the proceedings.

(f) "Adjudicatory hearing" means a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual; provided, that the procedures governing such hearing shall include but not limited to all of the following:

(1) Testimony under oath.
(2) The right to cross-examination and to confront adversary witnesses.
(3) The right to representation.
(4) The issuance of a formal decision.

(7) **Ark. Code Ann. Section 25-15-210**

(Subsection (b)(1)): In every case of adjudication, a final decision or order shall be in writing or stated in the record.

(Subsection (b)(2)): A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.

(Subsection (c)): Parties shall be served either personally or by mail with a copy of any decision or order.

(8) **North Carolina General Statutes, Section 150B-36(b):**

A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. . . . A copy of the decision, or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, ...

(9) **Ark. Code Ann. Section 25-15-212.**

(Subsection (a)) In cases of adjudication, any person, except an inmate under sentence to the custody of the Department of Correction, who

considers himself injured in his person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter. Nothing in this section shall be construed to limit other means of review provided by law.

(**Subsection (b)(1)**) Proceedings for review shall be instituted by filing a petition, within thirty (30) days after service upon petitioner of the agency's final decision in:

(A) The circuit court of any county in which the petitioner resided or does business; or

(B) The Circuit Court of Pulaski County.

(**Subsection (f)**): If, before the date set for hearing, application is made to the court for leave to present additional evidence and the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon any conditions which may be just. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(**Subsection (g)**): The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record,

testimony may be taken before the court. The court shall, upon request, hear oral argument and receive written briefs.

(**Subsection (h)**): The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the agency's statutory authority;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Not supported by substantial evidence of record; or
(6) Arbitrary, capricious, or characterized by abuse of discretion.

(10) **North Carolina Judicial Review Statute: N.C.G.S. 150B-43**

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. . . ..

(11) **N.C.G.S., Section 150B-45. Procedure for seeking review; waiver.**

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. . . .

(12) **N.C.G.S., Section 150B-51(b)**

. . . the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Not supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

(13) **California Code, Section 11523**

Judicial review may be had by filing a petition for a writ of a mandate in accordance with the provisions of the Code of Civil Procedure, ... Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered.

5. STATEMENT OF THE CASE

Petitioner Viswanathan was appellant-petitioner before the Supreme Ccurt of Arkansas. He was also the petitioner before the Circuit Court of Pulaski County seeking a judicial review of a decision by the Respondent Mississippi County Community College Board of Trustees, not to grant him a hearing. Petitioner was employed by the Respondent Agency Mississippi County Community College (hereinafter referred to as the College or

MCCC) Board of Trustees (hereinafter referred to as the Board), Blytheville, Arkansas as an Instructor in Mathematics/Physics during the academic year 1992-93. Viswanathan is a teacher with more than 25 years of professional experience.

The agency is a government agency of the State of Arkansas. It is a public institution of higher education supported in whole or in part by appropriation of state funds. By letter dated June 30, 1993 he filed a grievance against Dr. John Sullins, and Dr. Gary Taylor, President and Vice President-Dean for Academic Affairs of the College respectively. The grievance was addressed to Mr. Bill Ross, Chairman of the respondent Board. Petitioner never received any response from the Board.

Viswanathan is an alien, who requires a work permit or authorization from the

United States Immigration and Naturalization Service (INS). The petition for such a permit is to be made by the employer in a prescribed form. The petition in Viswanathan's case is called a H1-B Petition. Prior to the filing of the Petition with the INS, approval has to be obtained by making a Labor Condition Application (LCA) with the Alien Certification Division of United States Department of Labor. The LCA is done in a prescribed form. The Respondent College did not complete the form in the required manner. The Alien Certification Division returned the incomplete form to the College pointing out the defects and asking that a completed form be submitted in duplicate. One of the boxes which the College did not complete states that the College agreed to pay the prevailing wages. The College never resubmitted the form. When Viswanathan sought a meeting

with the College President and the Vice President dealing with the matter, he was told that the College would not check the boxes. At no stage of the application process, the employee himself is directly involved. He or she participates only by way of furnishing the employer the necessary and useful information for completing the LCA and the H1-B Petition.

Viswanathan filed a grievance against the College President and Vice President for Academic Affairs with the respondent Board of Trustees. While the College has a grievance procedure in place, the Grievance Committee, called the Professional Standards Committee is a committee of the President and reports its investigations to the President and the Vice President. Viswanathan took his grievance directly to the Board and requested that a mandate from the Board issue to the committee in the present

instance, which involved the very officers, whose committee the Professional Standards Committee was. He alleged that questions of conflict of interest must be addressed by the Board by issuing a mandate to the Committee that it was to investigate the grievance and report its findings directly to the Board or a subcommittee of the Board. To require that the Grievance Committee report to the Vice President and the President would render the grievance process meaningless and devoid of substance. The Respondent Board of Trustees acted on Viswanathan's Petition by refusing to give him the hearing, to which he was entitled.

Instead by letter dated August 23, 1993, Mr. Rodney Showalter, MCCC's Vice President/Dean for Administrative Affairs gave to petitioner a semi-formal notice of the termination of petitioner's employment with the College. (Viswanathan never

received formal notice of his termination.) Thereafter, petitioner initiated the procedure of the College for appealing the decision on employment termination. The Board denied him the requested hearing.

The respondent Board communicated to petitioner Viswanathan, then residing **in North Carolina** its final decision by letter dated October 20, 1993. This letter was received at the residence of the petitioner in Wilmington, North Carolina on October 28, 1993. Thereupon, Viswanathan filed in Pulaski Circuit Court a petition for judicial review, pursuant to **Arkansas Administrative Procedure Act (APA), Section 25-15-212**. The petition was filed on November 29, 1993.

Pursuant to **Ark. Code Ann. (ACA), Section 25-15-212 (b)(1)**, there is a mandatory time limit for filing a petition

for judicial review, which is recited in the following terms:

> "Proceedings for review **shall be** instituted by filing a petition within thirty (30) days after service upon the petitioner of the agency's final decision, ..."
>
> (emphasis added)

The statute recited above - **ACA 25-15-212(b)(1)** -while it specifically controls the length of the time-period for filing the Petition for Judicial Review does not provide that a certain method be used in computing the thirty (30)-day period. For the computation of the time period, one must look elsewhere. Section **ACA 25-15-210(c)** is one such statute. This statute required an interpretation concerning effective service by mail.

To preserve his rights for judicial review, petitioner took the initiative to move the Circuit Court to grant an enlargement of time to file the Petition and permit the petitioner to file the

Petition for Judicial Review. Petitioner made his request through motion that was entered on November 29, 1993, the same day, he filed the petition for judicial review.

The Circuit Court, the Honorable Judge Bogard, entered an **ORDER** on December 6, 1993, denying petitioner's motion to grant enlargement of time. Petitioner moved the Circuit Court seeking review and reconsideration of the Circuit Court's **ORDER** of December 6, 1993 by motion entered on December 20, 1993. In his brief and motion, petitioner argued that the filing of the original petition was timely, and that he did not need an enlargement of time to file the petition. He argued that a petition filed on November 29, 1993 was timely, as time began to run only on October 28, 1993, the date of receipt of the Board's letter, and that the 30-day period did not end until

November 29, 1993, since November 27, 1993 was a Saturday. Since petitioner had simultaneously made a request for filing his petition for judicial review with his motion for enlargement of time also entered on November 29, 1993, the motion for reconsideration should be granted and the filing of the petition for judicial review authorized.

The Circuit Court denied by **Order** entered on December 28, 1993 petitioner's motion for reconsideration stating that filing of the petition was not timely. The Circuit Court held that time began to run on October 20, 1993, the date of the Board's letter. The Court held as follows:

> The petition was filed well beyond the thirty day limit which began to run on October 20, 1993, and even beyond thirty days after receipt by the Petitioner.

Viswanathan then directly appealed to the Supreme Court of Arkansas invoking

that court's jurisdiction concerning construction and interpretation of the statutes **Ark. Code Ann, Section 25-15-210(c), and 25-15-212(b)(1)** concerning service by mail. Without considering the merits of the case, the Supreme Court upheld the Circuit Court's orders stating that the Circuit Court had no subject matter jurisdiction to entertain the petition for judicial review. The Arkansas Supreme Court held: "[i]t hardly need to be said that firing employees is clearly an administrative act and not a matter that involves the quasi judicial function of an agency." Opinion at 3. The Arkansas Supreme Court concluded that discharge of an employee is an administrative decision, and so not reviewable under the purview of the APA. Viswanathan thereafter requested a rehearing, which the State court denied. Viswanathan respectfully petitions the

Supreme Court of the United States to grant his prayer for a writ of certiorari to the Arkansas Supreme Court to review this decision. Petitioner also prays that the United States Supreme Court review the Orders of the Circuit Court of Pulaski County.

6. **FEDERAL QUESTIONS**

(1) In his "Points On Appeal", one of the questions presented by Viswanathan for review by the Arkansas Supreme Court concerned the unconstitutionality of the statute **Ark. Code Ann., Section 25-15-210(c), if construed in light of the order of the Circuit** Court of Pulaski County of December 28, 1993. He argued that the construction of the statute by the Circuit Court is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution. **ACA 25-15-210(c)** defines two classes of petitioners on whom service is effected. Citing Rule 5 of the **Arkansas Rules of Civil Procedure (ARCP)**, Viswanathan argued as follows (**Appellant's Abstract And Brief** at 27: Argument on Points On Appeal; also at page viii of **Appellant's Abstract and Brief**: **Item (3) in Questions Presented For Review By The Arkansas Supreme Court**):

> Service by mail of the agency's final decision is authorized by **ACA, Section 25-15-210(c).** But service by mail is complete only on the day the decision is delivered at the address. If it is claimed that service is complete upon mailing (as for example under **Rule 5, ARCP**), then such a provision under **AAPA, Section 25-15-210(c)** will be unconstitutional. **AAPA, Section 25-15-210(c)** creates two classes of would-be petitioners: those who are served the agency's final decision personally and those who are served the agency's final decision by mail in the form of substituted personal service. The first class of persons will have the full thirty-day period in which to decide to institute proceedings for judicial review; the second class of actions will not have the same full thirty-day period in which to decide to institute proceedings for judicial

> review. The time available to the second class of persons will not be uniform and will be left to the mercy of the mail carrier. In fact if it were true that service is complete upon mailing, then in the case of the appellant-petitioner, he would have only twenty-two (22) days in which to initiate the proceedings for judicial review. Such a disparity between the two classes of persons would violate the **Equal Protection Clause of the Fourteenth Amendment to the United States Constitution**. . . . Citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); see separate opinion by Justice Blackmun, Justice Brennan, Justice Marshall, and Justice O'Connor. The time-bar and jurisdictional arguments given by the Circuit Court in the instant case parallel closely arguments in the Illinois Supreme Court. See Logan at 427. The classification scheme of a statute must be rationally related to legitimate governmental objectives. None are present in the interpretation given by the Circuit Court. Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Lindsey v. Normet, 405 U.S. 56 (1972). The interpretation leads to a disparate treatment of the two cited classes. Rinaldi v. Yeager, 384 U.S. 305, 308, 310 (1966); James v. Strange, 407 U.S. 128, 140 (1972).

The Arkansas Supreme Court did not pass upon the question, and did "not address the merits of the appellant's points on appeal", stating that "the APA

is not applicable to the discharge of an employee." **Order at 4.**

(2) In his Petition for Rehearing to the Arkansas Supreme Court, Viswanathan raised the question of the unconstitutionality of the Arkansas statute, **Ark. Code Ann., Section 25-15-212(a), if construed in the way the Arkansas Supreme Court did in its Order.** The construction came into conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. Viswanathan stated:

> "The Arkansas Supreme Court's opinion [December 5, 1994 **Order**] comes into conflict with several decisions of the Supreme Court of the United States, starting with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and its progenies. Among the most important of the decisions of relevance are the following: Logan v. Zimmerman Brush Co. et al., 455 U.S. 422 (1982), and Boddie v. Connecticut, 401 U.S. 371, 380 (1971)." Appellant's Petition For Rehearing at 5.

Viswanathan argued that the question before the Arkansas Supreme Court was one of deciding if Viswanathan was "injured in his person, business or property by final agency action", and that as a non-probationary employee, he had an expectation of continued employment, that under the standard of Rogers v. Masem, 788 F.2d 1288, 1289, 1291 (8th Cir. 1985), Hilton v. PineBluff Public Schools, 796 F.2d 230, 232 (8th Cir. 1986), he had such a property right, and that he was entitled to adjudication. Please see also Connell v. Higginbotham, 403 U.S. 207, 208. In Connell, the Court held that "this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment." Board of Regents

v. Roth, 408 U.S. 564, 577. thus there ought to have been adjudication. The denial of the hearing by the Board amounted to an adjudication by the Board, even though it was insufficient.

> "The Court has overlooked the pertinent question: Are there property or personal rights emanating from the employment situation? Any reference to employment, per se, is relevant only to the extent to decide the emanation of these rights from the employment situation." Appellant's Petition For Rehearing at 4, paragraph 9.

> "It is well-known that probationary employees generally do not have entitlement to a property right in employment. Please see Alfred v. Little Rock School District, 274 Ark. 414, 418, 625 S.W.2d 487, 489 (1981); McElroy v. Jasper School District, 273 Ark. 143, 147, 617 S.W.2d 356, 358 (1981). Appellant Viswanathan was not a probationary employee." Appellant's Petition For Rehearing at 3, paragraph 6.

> "If the Arkansas Supreme Court's assertion on the firing and hiring of employees were generally true, then there would be no need to distinguish between a probationary employee and a nonprobationary employee. The Ark. Code Ann. does distinguish between these two classes of employees. Please

see the system of employment for state personnel under Ark. Code Ann. Section 21-4-203. Therefore, the Arkansas Supreme Court's holding is not consistent with the legislative intent of the General Assembly of Arkansas." Appellant's Petition For Rehearing at 4, paragraph 10.

"Nonprobationary employees have an expectation of continued employment. It is well known that expectation of continued employment carries with it a right to property that is determined by de facto policies and practices. Please see Rogers v. Masem, 788 F.2d 1288, 1289 (8th Cir. 1985) at 1291. Rogers is a case involving the Little Rock School System in Arkansas. See also Hilton v. PineBluff Public Schools, 796 F.2d 230, 232 (8th Cir. 1986). Appellant's Petition For Rehearing at 4, paragraph 11.

"Appellant was not on "probationary contract". Please see the system of employment for state personnel under Ark. Code Ann. Section 21-4-203. In Arkansas Livestock and Poultry Comm'n v. House, 276 Ark. 326, 634 S.W.2d 388 (1982) appellee House was a probationary employee, and so not entitled to due-process proceedings. Thus appellee's citation of Arkansas Livestock only strengthens appellant's argument. Further support is given by Exhibit AA which is an extract from Mississippi County Community College Academic Staff Handbook 1992-93. The Board was required by law to adjudicate appellant's original grievance (Abstract, paragraph 1) and his appeal

following termination (Abstract, paragraph 2). Please see definition of "Adjudication" and of "Order" in Ark.Code Ann. 25-15-202(7) and (6), and Exhibit AA." Appellant's Reply Brief at 7.

"It has been held that expectation of continued employment vests property rights and interests and so a deprivation of such property without due process is in violation of the Constitutions of Arkansas (Article 2, Section 21) and of the United States (Fourteenth Amendment). However, the property right is not vested in case of "probationary" employees unless explicitly included. Arkansas Teacher Fair Dismissal Act, Ark. Code Ann. Section 80-1264.3, .4, .8, recodified since then. Rogers v. Masem, 788 F.2d 1288, 1289 (8th Cir. 1985) under 1979 version of the Act; the trial court "concluded Rogers was not deprived of a property interest in continued employment since he was a probationary employee . . . ". Rogers at 1291. Also Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972), cited in Rogers at 1294; and Thompkins v. Stuttgart School Dist. No. 22, 858 F.2d 1317 (8th Cir. 1988)." Appellant's Reply Brief at 7.

Viswanathan argued that the Arkansas Supreme Court was denying him an opportunity to be heard and to litigate, that access to the courts is a property

right and that the deprivation of that right without due process is unconstitutional. He cited Logan v. Zimmerman Brush Co. et al., 455 U.S. 422 (1982) (Logan's right to use the FEPA's adjudicatory procedures is a protected right."); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) ("The Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent" of denying them an opportunity to be heard upon their claimed right[s]."") He raised the question that Ark. Code Ann. 25-15-212 (a), if construed in the way the **Order** did, compromises the rights to litigate of all employees who are discharged. Such a right is conferred upon some employees by the APA, Section 25-15-212(a). A construction of the statute that takes

away such a right without due process of law, he argued, is unconstitutional.

> "The judicial review conferred by the APA has all the characteristics of a cause of civil action. This view is confirmed by provisions in Ark. Code Ann., Section 25-15-212 (f, g, h) providing for a de novo review, including the taking of new and additional testimony. The Supreme Court of the United States has affirmatively held the following: "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Mullane v. Central Hanover Bank & Trust Co., U.S. 306 (1950). "[A] state tort claim is 'a species of property' protected by the Due Process Clause'. Martinez v. California, 444 U.S. 277, 281-282 (1980)." Appellant's Petition For Rehearing, at page 6, paragraph 14.

> "The APA confers the right to judicial review, when there is injury to an individual's person in the form of deprivation of personal rights. A person attempting to redress his grievances through recourse to the courts is protected by the Due Process Clause. Please see Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958). The Fourteenth Amendment's Due Process Clause and Equal Protection Clause impose "constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." "The Fourteenth Amendment's Due Process

> Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." Boddie v. Connecticut, 401 U.S. 371, 380 (1971)." Appellant's Petition For Rehearing, at page 7, paragraph 15.
>
> "Like Logan's right to use the FEPA's adjudicatory procedures, appellant Viswanathan's right to use judicial review under the APA is a protected right. Appellant respectfully brings to the attention of the Arkansas Supreme Court the admonition contained in Vitek v. Jones, 445 U.S. at 490-491, no. 6 quoting Arnett v. Kennedy, 416 U.S. at 167: "[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." "[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Boddie, 401 U.S. at 377." Appellant's Petition For Rehearing, at page 7, paragraph 16.

The Arkansas Supreme Court did not pass upon this issue and denied rehearing summarily.

(3) Viswanathan raised the issue of the sufficiency of the

adjudicative process in his petition for certiorari before the Arkansas Supreme Court. He expanded upon this in his brief on the merits as well as in his reply brief and presented it as a constitutional issue in his petition for rehearing. The adjudication in the Board's letter denying a hearing did not meet due-process requirements:

> "Appellant respectfully brings to the attention of the Arkansas Supreme Court the admonition contained in Vitek v. Jones, 445 U.S. at 490-491, no. 6 quoting Arnett v. Kennedy, 416 U.S. at 167: "[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." "[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Boddie, 401 U.S. at 377." Appellant's Petition For Rehearing, at page 7, paragraph 16.

> "A decision, pursuant to an administrative adjudication, must show strict compliance with the law. The Respondent-Appellee Agency's decision is ineffective inasmuch as the copy of the decision in writing served on the

Petitioner-Appellant does not contain findings of fact nor conclusions of law as required by Section 25-15-210(b)(2). It was held by the California Court of Appeals in Koons v. Placer Hills Union School District, 132 Cal. Rptr. 243, 61 Cal. App.3d 484 (1976) as follows in a judicial review of an administrative dismissal of a probationary teacher:

> Failure to comply with statute requiring the agency decision be in writing and contain findings of fact and that a copy of decision be delivered to parties renders ineffective a decision as to dismissal of probationary teacher after the hearing contemplated by . . ..

Hence there was no statutorily-valid decision of the adjudicative process and so service of that decision is itself not valid. There was no effective service pursuant to Section 25-15-212(b)(1) that could enter into a discussion of the statutory time limitation. The filing should be allowed as a result." Petition For A Writ Of Certiorari [to Ark. Supreme Court] at page 22, paragraph (xvi).

The Arkansas Court did not pass upon this issue.

7. This Petition does not seek a review of a judgment of a United States Court of Appeals.

REASONS FOR GRANTING

Review by certiorari is appropriate in the case at bar under the following rules:

(i) Under Rule 10.1(b) of the Rules of the United States Supreme Court, this being a proceeding involving a decision of the Arkansas Supreme Court in conflict with decisions of the highest courts of last resort of North Carolina, of California, of Delaware, and of other states. The Arkansas statutes are not very different from Administrative Procedure Acts of the states referred to.

(ii) Under Rule 10(b), since the decision of the highest court of Arkansas of last resort is also in conflict with a decision of the United States Court of

Appeals for the Eighth Circuit, a decision holding that a [probationary] teacher of Arkansas had a property right in his [probationary] employment and that he was deprived of his property without due process of law. Rogers v. Masem, 788 F.2d 1288, 1289, 1291 (8th Cir. 1985).

(iii) Under Rule 10.1(c) of the Rules of the Supreme Court of the United States, this being a proceeding involving a federal question, which the Arkansas Supreme Court has decided in a way that conflicts with applicable decisions of this Court, beginning with Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

(iv) Under Rule 10.1(c), since the right to litigate is a fundamental liberty and property right and is intimately connected with procedures. As such this right to litigate is a federal question. Time for filing is one element of

procedure controlling this federal question.

ARGUMENT

1. Petitioner has stated most of his argument in the section under "Statement of the Case", in the sections under "Federal Questions", "Jurisdiction", and "Reasons for Granting". Petitioner will amplify the reasons further as follows.

APA AND EMPLOYMENT

2. The Arkansas Supreme Court has denied Viswanathan an opportunity to be heard and to litigate. Access to the courts is a property right and that the deprivation of that right without due process is unconstitutional. The judicial review conferred by the APA has all the characteristics of a cause of civil action. This view is confirmed by provisions in Ark. Code Ann., Section 25-

15-212 (f, g, h) providing for a de novo review, including the taking of new and additional testimony. The Supreme Court of the United States has affirmatively held that "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Mullane v. Central Hanover Bank & Trust Co., U.S. 306 (1950). "[A] state tort claim is 'a species of property' protected by the Due Process Clause'. Martinez v. California, 444 U.S. 277, 281-282 (1980)."

3. The APA confers the right to judicial review, when there is injury to an individual's person in the form of deprivation of personal rights. A person attempting to redress his grievances through recourse to the courts or established adjudicatory procedures or their equivalent is protected by the Due

Process Clause. Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

4. Petitioner has already stated in the section under "Statement of the Case" the holdings of the United States Supreme Court on the constitutional rights of parties to use the adjudicatory procedures flowing from the Arkansas Administrative Procedure Act. The Board of Trustees of the College did not refuse to act on Viswanathan's request for a hearing to which he was entitled under the College regulations cited in the Appendix. The Board denied a hearing and thus made an adjudication as defined by the Arkansas APA ("Adjudication" is agency's process for the formulation of an order.) The Arkansas APA makes judicial review an entitlement for any person, who considers himself injured in his property, business, or person. The United States Court of Appeals for the 8th Circuit in Rogers v.

Masem, 788 F.2d 1288, 1289, 1291 (8th Cir. 1985) has already held that a teacher employment in Arkansas has entitlement to property. Rogers again dealt with the situation of a probationary teacher. Viswanathan was a "regular employee" of the State, not a probationary, and as stated he was offered a contract for the 1993-94 academic year, which Viswanathan accepted. It is the College which did not resubmit its application concerning Labor Condition, and this led to a grievance charge against the College President and the Vice President for Academic Affairs. Viswanathan was never given a notice of termination. It is not for the Arkansas Superior Court to decide where things went wrong, as this belongs to the domain of the Circuit Court. The question before the Arkansas Supreme Court was the simple one of determining, if Viswanathan's filing of the petition for judicial review

was timely or not, notwithstanding his motion for extension of time to file the petition. The State Supreme Court did not rule on this. Petitioner argues that Viswanathan has a right to use the adjudicatory procedure outlined in the Arkansas APA on the basis of the holdings in Logan v. Zimmerman Brush Co. et al., 455 U.S. 422 (1982) (Logan's right to use the FEPA's adjudicatory procedures is a protected right."); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) ("The Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent" of denying them an opportunity to be heard upon their claimed right[s]."), Vitek v. Jones, 445 U.S. at 490-491, no. 6 quoting Arnett v. Kennedy, 416 U.S. at 167: ("[T]he adequacy of statutory procedures

for deprivation of a statutorily created property interest must be analyzed in constitutional terms." "[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Boddie, 401 U.S. at 377."), Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958) ("A person attempting to redress his grievances through recourse to the courts is protected by the Due Process Clause. The Fourteenth Amendment's Due Process Clause and Equal Protection Clause impose "constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."), Mullane v. Central Hanover Bank & Trust Co., U.S. 306 (1950) ("[A] cause of action is a species of property

protected by the Fourteenth Amendment's Due Process Clause."), Martinez v. California, 444 U.S. 277, 281-282 (1980) ("[A] state tort claim is 'a species of property' protected by the Due Process Clause'.").

5. An important consideration in this situation is that the Arkansas APA in Sections 25-15-212 (f, g, h) provides for a de novo trial, investing judicial review with elements of a cause of action. In discussing the rule as to proceedings in court on appeal from the action of administrative bodies this rule is laid down in Amer. Jur. Prud., 42, p.664: "The statute may expressly provide that the court may hear new or additional evidence, and this may be construed as requiring a trial de novo."

6. The Supreme Court of the United States, considering procedure of the courts on appeals from statutory

administrative body, in the case of United States v. Ritchie, 17 How. 525, 533, 541, 15 L.ed. 236, said: : . . . [T]he suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case de novo, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce."

7. Petitioner has reproduced the corresponding sections of the Administrative Procedure Act from three states, namely, Arkansas, California, and North Carolina. As can be seen, even the definitions, the scope and the procedures for judicial review are not much different from one another. One basis for seeking judicial review in all of them is injury to property, business, or person, and the statutes make judicial review an entitlement.

8. The Arkansas Supreme Court has overlooked the fact that there are employment situations, where termination or nonrenewal of the employment contract causes injury to a person's property and/or person. A wholesale rejection of all employment situations as an exception to the APA overlooks the constitutional protection built in some cases. There are any number of case laws, most of them

built in the eighties, which the Arkansas Court has overlooked. The Court did not even go into the merits of Viswanathan's particular case. It ruled as follows:

> The appellant's [Viswanathan's] points on appeal concern the administrative adjudication process and the procedures for filing a petition for judicial review pursuant to the Administrative Procedure Act. Because the APA is not applicable to the discharge of an employee, we do not address the merits of the appellant's point son appeal."

9. Petitioner has cited in the foregoing Koons v. Placer Hills Union School District, 132 Cal. Rptr. 243, 61 Cal. App.3d 484 (1976). Koons is particularly apt, because it even deals with a situation, where a probationary public school teacher was not rehired. There is a contention in that case that the school board's administrative action was not cognizable under certain provisions (Section 11523) of the California APA. The California Court of

Appeal overruled the contention, and supported its holding by several decisions of the California Court of Appeal. The Court, in particular, ruled that time provisions of the California APA are incorporated into the Education Code on probationary teacher dismissals, and cited Compton v. Board of Trustees (1975) 49 Cal. App. 3d 150, 154, 122 Cal. Rptr. 157; Burgess v. Board of Education (1974) 41 Cal. App. 3d 571, 577, 116 Cal. Rptr. 183. Thus the California APA is applicable to employment situations.

10. Reemployment of probationary teachers is a recurring theme in the case law under the California APA. Petitioner Viswanathan was not a probationary employee, but a regular employee of the State of Arkansas, when he was non-renewed in a strange way. His discharge from employment was a constructive discharge, involving the failure of the College to

resubmit the documentation for authorization of employment of an alien to the United States Department of Labor. As stated in the Statement of the Case, Viswanathan is an alien, who requires authorization from the U.S. Immigration and Naturalization Service. Viswanathan had no part to play in the process for application for authorization. However, none of these facts and issues were before the Arkansas Supreme Court.

11. Among other California case law dealing with employment situations, the following are relevant: Rutherford v. Board of Trustees, 37 Cal. App.3d 775, 112 Cal. Rptr. 560 (1974), dealing with nurses who were not reemployed, Feist v. Rowe, 3 Cal. Appl.3d 404, 83 Cal. Rptr. 465 (1970), dealing with reemployment of a probationary teacher; Ward v. Fremont Unified School Dist., 276 Cal. Appl.2d 313, 80 Cal. Rptr. 815 (1969), dealing

with reemployment of a probationary teacher; Martino v. Concord Community Hospital Dist., and 233 Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965), dealing with the hiring of a physician to state hospital.

APA AND DUE PROCESS

12. The Board's final decision did not give due process, as it did not state findings of fact and conclusions of law, a mandatory requirement in the language of the Act in Section 25-15-210(b)(2). Hence it is unconstitutional application of the APA. "A decision, pursuant to an administrative adjudication, must show strict compliance with the law." Koons v. Placer Hills Union School District, 132 Cal. Rptr. 243, 61 Cal. App.3d 484 (1976). The California Court held as follows in

its judicial review of an administrative dismissal of a probationary teacher:

> Failure to comply with statute requiring the agency decision be in writing and contain findings of fact and that a copy of decision be delivered to parties renders ineffective a decision as to dismissal of probationary teacher after the hearing contemplated by . . ..

A similar holding in Lucas v. Board of Education, 13 Cal.3d 674, 678 119 Cal. Rptr. 462, 532 P.2d 110 is also relevant.

13. In the instant case, there was no statutorily-valid decision of the adjudicative process. The right to seek redress of one's grievances through a Grievance procedure is a vested right. "In the judicial review of an administrative agency's decision that affects a vested, fundamental right, the trial court not only examines the administrative record

for errors of law, but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." Bixby v. Pierno, 4 Cal. App. 3d 130, 93 Cal. Rptr. 234, 481 P.2d 242 (1971).

14. In North Carolina, judicial review of employment situations has been pursued in a number of cases. Petitioner cites some dealing with teacher employment: Batten v. N.C. Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990); Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987); Evers v. Pender County Bd. of Educ., 104 N.C. App. 1, 407 S.E. 2d 879, aff'd 331 N.C. 380, 416 S.E. 2d 3 (1992); Meyers v. Dep't of Human Resources, 105 N.C. App. 665, 415 S.E.2d 70 (1992); and Warren v. New Hanover County Bd. of Educ., 104 N.C. App. 522, 410 S.E.2d 232 (1991). It can be seen that judicial review is an entitlement in many employment situations.

TIMELINESS OF PETITION

15. If it is held that time for filing a petition for judicial review begins to run from the day the final decision is mailed to a petitioner, then the statute or decision that authorizes such an interpretation is unconstitutional, being in violation of the Equal Protection Clause. Service by mail of the agency's final decision is authorized by **ACA, Section 25-15-210(c).** If it is claimed that service is complete upon mailing, then such a provision under **AAPA, Section 25-15-210(c)** will be unconstitutional. **AAPA, Section 25-15-210(c)** creates two classes of would-be petitioners: those who are served the agency's final decision personally and those who are served the agency's final decision by mail in the form of substituted personal service. The first class of persons will have the full

thirty-day period in which to decide to institute proceedings for judicial review; the second class of actions will not have the same full thirty-day period in which to decide to institute proceedings for judicial review. The time available to the second class of persons will not be uniform and will be left to the mercy of the mail carrier. In fact if it were true that service is complete upon mailing, then in the case of the appellant-petitioner, he would have only twenty-two (22) days in which to initiate the proceedings for judicial review. Such a disparity between the two classes of persons would violate the **Equal Protection Clause of the Fourteenth Amendment to the United States Constitution**. Citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); please see separate opinion by Justice Blackmun, Justice Brennan, Justice Marshall, and Justice O'Connor. The

time-bar and jurisdictional arguments given by the Circuit Court in the instant case parallel closely arguments in the Illinois Supreme Court. See Logan at 427. The classification scheme of a statute must be rationally related to legitimate governmental objectives. None are present in the interpretation given by the Circuit Court. Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Lindsey v. Normet, 405 U.S. 56 (1972). The interpretation leads to a disparate treatment of the two cited classes. Rinaldi v. Yeager, 384 U.S. 305, 308, 310 (1966); James v. Strange, 407 U.S. 128, 140 (1972).

16. At any rate, the United States Supreme Court has already ruled on when time begins to run, wherever there is involved a person's substantial right. The right to use the procedure for judicial review is both a property right and a personal liberty right. In

Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 676, 70 S.Ct. 876, 881, 94 L.Ed. 1194, the U.S. Supreme Court had considered the date of issuance of a certificate of public convenience and necessity. The Court held:

> . . . But surely a certificate cannot be said to have been issued for purposes of defining rights and the seeking of reconsideration by an aggrieved person if its substance is merely in the bosom of the Commission. Knowledge of the substance must to some extent be made manifest.

17. Constructing when knowledge of the substance of what is in an agency's bosom is made manifest, the United States Court of Claims in American Const.Co.v. United States, 107 F.Supp. 858 (U.S.C.C., 1952); Cert. denied, 345 U.S. 922, 923; 97 L.ed. 1354 held as follows:

> We have carefully considered the arguments and authorities advanced by defendant. We have concluded, however, that the six-month period for appeal under the Lucas Act

> should be computed from . . . the date plaintiff received notice of the Board's action.

In reaching its conclusion, the Court Of Claims had to make a statutory construction. The Court proceeded step-wise. In Step 1 at 861, the Court stated:

> Until the Board had taken final action plaintiff as a matter of law could not have filed suit in this court. Richardson v. United States, 86 F.Supp. 1019, 114 Ct.Cl. 695, 701. Until plaintiff knew the nature of that final administrative action it did not know whether it would be necessary or advisable to appeal."

In Step 2 at 861, the Court then pierced a common-sense interpretation of the time limitation with statutory language. The Court stated:

> At no time prior to notice of the Board's action in the instant case, however, could plaintiff reasonably have been expected to file suit, or to have notice of accrual of its right to sue."

In Step 3 at 862, the Court looked for support from other statutory authorities for its construction. The Court cited the Supreme Court of the United States in Skelly Oil Co., 339 U.S. 667, 676, 70 S.Ct. 876, 881. The Court then concluded at 862:

> Similarly knowledge of the substance of the Board's action must have been communicated to plaintiff before its rights were affected. The statute of limitations did not begin to run until July 24, 1948, when plaintiff received knowledge of the Board's decision, and plaintiffs suit was filed within the required six-month period.

18. In Koons v. Placer Hills Union School District, 132 Cal. Rptr. 243, 61 Cal. App. 3d 484 (1976), the California Court felt compelled to make a statutory construction as to when time began to run. It did so by a series of three steps. In Step 1 at 488, the California Court concluded that judicial review was available to a probationary teacher under

California law. In Step 2, the Court constructed that "the earliest date upon which an administrative agency's decision can become effective, thereby commencing the limitations period [for judicial review petition] as the date on which the decision is mailed or delivered." (emphasis added). Finally the Court concluded at 492 that, "The delivery to petitioner on August 6, 1974, of the board's formal decision, findings and conclusions initiated the 30-day period of limitations [for judicial review]."

19. Another line of argument available in this case is the following: Since the Board's final decision did not state findings of fact and conclusions of law, and thus did not give due process, it is unconstitutional application of the APA. As it did not show compliance with the law, it is not a final decision at all, and the rules on service only apply

to a final decision that meets statutory standards. Thus there was no service to speak about. So time has never begun to run. There was no effective service pursuant to Section 25-15-212(b)(1) that could enter into a discussion of the statutory time limitation. The filing should be allowed as a result.

UNCONSTITUTIONALITY OF REGULATIONS

20. As stated in the foregoing, Viswanathan filed a grievance against the College President and Vice President for Academic Affairs with the respondent Board of Trustees. While the College has a grievance procedure in place, the Grievance Committee, called the Professional Standards Committee is a committee of the President and reports its investigations to the President and the Vice President. Please see Appendix.

Viswanathan took his grievance directly to the Board and requested that a mandate from the Board issue to the committee in the present instance, which involved the very officers, whose committee the Professional Standards Committee was. He alleged that questions of conflict of interest must be addressed by the Board by issuing a mandate to the Committee that it was to investigate the grievance and report its findings directly to the Board or a subcommittee of the Board. To require that the Grievance Committee report to the Vice President and the President would render the grievance process meaningless and devoid of substance. The Respondent Board of Trustees acted on Viswanathan's Petition by refusing to give him the hearing, to which he was entitled.

21. The situation is one involving two parties in a grievance procedure,

where the party accused, is in charge of the process and controls it or has all the leverage to control it. Such a situation is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

22. The College itself recognizes in its grievance procedure the right of a faculty member to seek to redress his grievances. The question is one of what is the due process under the circumstances.

23. In the language of the Supreme Court, "[o]nce it is determined that due process applies, the question remains what process is due." Morissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

24. To determine what process was due Viswanathan the Court must start with a consideration of the three-part balancing test adopted by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

25. Viswanathan's private interest in this case is one of making a living, loss of property, and professional reputation, he being an experienced teacher with twenty-five years of professional experience. Viswanathan has sought reinstatement, being made whole in every sense, backpay, and damages to him and his family. Viswanathan has been unable to get full-time employment since he was discharged from his employment.

26. Moreover, the right to seek redress for one's grievances is a liberty right, as stated by the authorities above. Thus, both property and liberty rights are

protected by the Due-Process Clause of the Constitution.

27. The third Eldridge factor is of no consequence here, as there must be a grievance procedure in place by the terms of the College's own regulation. Moreover, State law makes it incumbent upon the College to provide for a proper due-process procedure.

28. The crucial element in this balancing test, when applied to this case, is the second Eldridge factor, which requires the Court to balance the risk of: "An erroneous deprivation of [the private] interest through the procedures used" against the "probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335, 96 S.Ct. at 903.

29. "Any enquiry under the second Eldridge heading must necessarily be very fact-specific . . .. [A] slight

modification of the facts, suddenly, 'smack[s] . . . of administrative tyranny.'" Buttrey v. United States, 690 F.2d 1170, 1178 (5th Cir. 1982), cert. denied, 461 U.S. 927, 103 S.Ct. 2087, 77 L.ed. 2d 298 (1983).

30. "Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected. See Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893,902, 47 L.ed.2d 18 (1976); Morissey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600." Cited in Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988).

31. "The time-honored phrase 'due process of law' expresses the essential requirement of fundamental fairness. . . . [T]he procedures employed . . . must be tested by the extent to which they comport

with the requirement of fundamental fairness." Gorman, supra at 12.

32. "[A]n impartial and independent adjudicator 'is a fundamental ingredient of procedural due process.'" Gorman v. University of Rhode Island, 646 F.Supp. 799, 810 (D.R.I. 1986). Please also see Withrow v. Larkin, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975).

33. In the instant case, the grievance committee as a committee of the president and his Cabinet, is not an independent adjudicator, when the grievance, is against the President and a member of his Cabinet. Moreover, the requirement that the committee report its findings to the President and the Vice President is devoid of fundamental fairness. The appeal from the grievance committee is then taken to the Vice President involved in the grievance and then to the President. Under the circumstances, an independent

mandate from the Board appears to be the right procedure. The existing procedure reproduced herein is repugnant to the very concept of due process, and is thus unconstitutional.

CONCLUSION

Petitioner respectfully prays that the Supreme Court of the United States consider the issues and points herein raised for a review of the **Orders** cited, and based on the foregoing and the merits of the case set forth herein grant petitioner's prayer for a writ of certiorari to the Supreme Court of Arkansas to review the **Orders** appealed from. Petitioner prays that the United States Supreme Court reach the merits of the case, remand the case to the Arkansas Supreme Court with directions to vacate the Circuit Court's **Orders**, and to enter

an **Order** permitting the filing of the petition and the institution of proceedings for a judicial review of the administrative adjudication of the Respondent Mississippi County Community College Board of Trustees.

Respectfully submitted

T. M. Viswanathan

Tenkasi M. Viswanathan, Pro-se
P.O. Box 295
Newell NC 28126
Tel: 704-547-3965

APPENDIX

SUPREME COURT OF ARKANSAS

No. 94-446

Opinion Delivered DEC 05 1994

T E N K A S I M . VISWANATHAN, APPELLANT V. THE MISSISSIPPI COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES, APPELLEE,	APPEAL FROM THE THE PULASKI COUNTY CIRCUIT COURT, No. 93-8501 **HON. DAVID BOGARD, JUDGE,** **AFFIRMED.**

STEELE HAYS, Associate Justice

Appellant Tenkasi M. Viswanathan appeals the denial of a motion requesting an extension of time in order to file a petition for judicial review pursuant to the Arkansas Administrative Procedure Act (APA). Ark. Code Ann., Section 25-15-201 - - 214 (Repl. 1992 and Supp. 1993). We hold the APA is not applicable to the

discharge of an employee and affirm the circuit court's denial of the motion.

Appellant Viswanathan was an instructor at Mississippi County Community College during the 1992-93 school year. Appellee Mississippi County Community College Board of Trustees notified Mr. Viswanathan that he would not be offered a contract for the 1993-1994 school year. The letter of notification was dated October 20, 1993, and Mr. Viswanathan asserts he received the letter on October 28. On November 29, Mr. Viswanathan filed his motion for an extension of time in order to file a petition for judicial review.

In an order filed December 6, the trial court denied the motion. Subsequently, Mr. Viswanathan filed a motion for reconsideration pursuant to ARCP Rule 59. The trial court held Mr. Viswanathan had thirty days to file his petition for judicial review pursuant to Ark. Code

Ann., Section 25-15-212(b)(1) (Repl. 1992). The trial court found the time began to run when the letter was mailed on October 20 and the Administrative Procedure Act does not provide an exception to the thirty day requirement. Consequently, the trial court denied the motion for reconsideration. Mr. Viswanathan appeals from the December 6 Order and the order denying reconsideration. He raises seventeen points on appeal.

Jurisdiction

Mr. Viswanathan sought an extension in order to file a petition for judicial review pursuant to the judicial review provision (Ark. Code Ann., Section 25-15-212) of the Administrative Procedure Act. Section 25-15-212, Administrative adjudication -- Judicial review, provides in part:

> (a) In cases of adjudication, any person . . . who considers himself injured in his person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter.

However, in Ark. Livestock & Poultry Comm'n v. House, 276 Ark. 326, 634 S.W. 2d 388 (1982), we held the discharge of an employee is not an adjudication but administrative decision and the circuit court is without jurisdiction to review such actions. See also Stafford v. City of Hot Springs, 276 Ark. 466, 637 S.W.2d 553 (1982). In Ark. Livestock & Poultry Comm'n we wrote:

> It seems too obvious for serious argument that the Administrative Procedure Act, enacted in 1967, was never designed nor intended to create supervisory responsibility by the judicial branch of state government

over the day-to-day actions of the executive branch, including the hiring and firing of personnel, but, rather, to establish procedures for hearings and notice (which meet due process requirements) in those functions of the executive branch which are basically adjudicatory or quasi judicial, particularly with respect to rule making, the renewal of licenses, and where, under law, an agency of the State must make orders based on the adjudication process. But it is only in the judicial functions that the Administrative Procedure Act purports to subject agency decisions to appellate review and then only as narrowly prescribed in the act. See J. L. Williams & Son v. Smith, 205 Ark. 604, 170 S.W. 2d 82 (1943). It hardly need be said that firing employees is clearly an administrative act and not a

matter that involves the quasi judicial function of an agency.

Thus, assuming that the Administrative Procedure Act even applies to a decision made by the Board of Trustees, the discharge of an employee is an administrative decision.

Jurisdiction is a question the court can address at any time. Skelton v. City of Atkins, 317 Ark. 28, 875 S.W.2d 504 (1994). In fact, it is not only the right but the duty of the Court to determine whether there is jurisdiction of the subject matter. Id. Accordingly, we find the circuit court was without subject matter jurisdiction, and we affirm the circuit court's decision. We will sustain the trial court's decision if it is right, even though we may do so on a different basis. McNair v. McNair, 316 Ark. 299, 870 S.W.2d 756 (1994).

The appellant's points on appeal concern the administrative adjudication process and the procedures for filing a petition for judicial review pursuant to the Administrative Procedure Act. Because the APA is not applicable to the discharge of an employee, we do not address the merits of the appellant's points on appeal.

Affirmed.

Office of The Clerk
Supreme Court of The State of Arkansas

Letter from The Clerk's Office
Dated January 17, 1995

Tenkasi M. Viswanathan
P.O. Box 295
Newell, North Carolina 28403

RE: 94 00446 TENKASI M. VISWANATHAN V. THE MISSISSIPPI COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES

Dear Mr. Viswanathan:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

Leslie W. Steen, Clerk

LWS: rh

cc: Everett Edsel Harber
Jacquetta Alexander, Clerk
(# 93-8501)

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

SIXTH DIVISION

ORDER FILED 1993 DEC-6 AM 10:42
BY JACQUETTA ALEXANDER
PULASKI COUNTY CLERK

TENKASI M. VISWANATHAN PETITIONER

V. NO. 93-8501

THE MISSISSIPPI COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES RESPONDENT

ORDER

Petitioner's motion to grant enlargement of time is hereby denied.

IT IS SO ORDERED.

DAVID B. BOGARD
CIRCUIT JUDGE

DATE: 12-2-93

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

SIXTH DIVISION

ORDER FILED 1993 DEC 28 AM 10:45
BY JACQUETTA ALEXANDER
PULASKI COUNTY CLERK

TENKASI M. VISWANATHAN PETITIONER

V. NO. 93-8501

THE MISSISSIPPI COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES RESPONDENT

ORDER

The Court has considered Petitioner's Motion for Reconsideration of the December 6, 1993, order denying Petitioner's request for enlargement of time to petition for judicial review. The court must deny Petitioner's motion for the following reasons.

The final decision by the Respondent was rendered by way of a letter to the Petitioner on October 20, 1993. The Petitioner received the decision on October 28, 1993. Pursuant to Ark. Code Ann. 25-15-212(b)(1), the Petitioner has

thirty days after service to petition for a review of the final agency decision.

Petitioner's Motion for Enlargement of Time and Permission to File Petition for Judicial Review were filed on November 29, 1993. The petition was filed well beyond the thirty day limit which began to run on October 20, 1993, even beyond thirty days after receipt by the Petitioner. The Arkansas Administrative Procedure Act does not provide for an exception to the thirty day period in which to petition for review.

Additionally, the court notes that the Arkansas Supreme Court has held in numerous decisions, "the Arkansas Rules of Civil Procedure do not apply to civil actions brought under the Administrative Procedure Act." Wright v. Arkansas State Plant Board, 311 Ark. 125, 842 S.W. 2d 42 (1992). The court went on to say that the

Administrative Procedure Act is an exception under Ark. Civ. Pro. Rule 81(a).

IT IS THEREFOR [sic] ORDERED AND ADJUDGED that Petitioner's Motion for Reconsideration is denied as the court is without jurisdiction to enlarge the thirty day time period in which to petition for judicial review in this matter.

David B. Bogard
Circuit Court Judge

12/28/93
Date

MISSISSIPPI COUNTY COMMUNITY COLLEGE
ACADEMIC STAFF HANDBOOK
1992-93

SECTION VII
EMPLOYMENT, RESIGNATION, AND TERMINATION
SUBSECTION G.
GRIEVANCE PROCEDURE

Mississippi County Community College recognizes the right of faculty and staff members to seek a solution concerning disagreements arising from employment relationships, and the employee assertion

that he or she has been wronged with regard to employment contract, College policy, procedure, or professional standards.

Resolution to disagreement should originate from informal grievance procedures if at all possible.

Informal grievance procedures are initiated by a meeting between the employee and his immediate supervisor or assistant dean/chairperson. At this time, the problem should be defined completely, and possible resolutions should be discussed. Every effort should be made at this level to reach an equitable solution. If at this meeting the issue is not resolved, the person should request a conference with the appropriate vice president/dean. If no resolution is found and the problem still exists, formal grievance procedures are then initiated.

Formal Grievance Procedure

1. No formal grievance shall be processed until the Professional Standards Committee has assessed whether there are reasonable grounds for considering the complaint based on existing policy of the College and whether the complainant has exhausted the prior informal grievance processes.
2. The complainant shall file a formal complaint with the Professional Standards Committee through the office of the appropriate vice president/dean. The written complaint should outline the problem, include the resolution/remedy sought, and summarize reasons why informal procedures have been unsatisfactory.
3. The Committee shall, in confidence, hear testimony for the complaint from all individuals that the Committee determines necessary to reach a

decision. The jurisdiction and authority of the Professional Standards Committee shall be to hear evidence, to make findings of fact, and to make recommendations based upon those facts.

4. A report of "Findings and Recommendations" will be forwarded to the vice president/dean. The vice president/dean may take actions recommended by the Committee or reject recommendations, may modify recommendations, or may remand the recommendations of the Committee for further consideration.

5. If the aggrieved person is not satisfied with disposition of his grievance at this level, then the grievance should be presented to the President of the College in writing attached to all previous findings and recommendations.

6. If at this level the problem is not resolved, the complainant should, after a period of ten days, submit the nature of the grievance in writing to be conveyed to the Board of Trustees through the Office of the President. The Board of Trustees shall arrange consideration of the complaint and render its decision. The decision of the Board will be final.

MISSISSIPPI COUNTY COMMUNITY COLLEGE
ACADEMIC STAFF HANDBOOK
1992-93

SECTION V.
MAJOR INSTITUTIONAL COMMITTEES
SUBSECTION F.
Professional Standards Committee

The Professional Standards Committee exists to review and recommend regarding matters of professional misconduct or formal grievances of faculty and administrative staff members.

The Professional Standards Committee is advisory to the Cabinet and meets only when requested by a Cabinet member, the President, or actual need. The members shall include three faculty members and two administrative staff members who are appointed by the President for a period of two years.

MISSISSIPPI COUNTY COMMUNITY COLLEGE
ACADEMIC STAFF HANDBOOK
1992-93

SECTION VII.
EMPLOYMENT, RESIGNATION, AND TERMINATION
SUBSECTION H.
Termination

In the case of any faculty member whose contract is terminated prior to the issue of new contracts, or at any other time, the following procedures are adopted:

1. Letter to said faculty member from the Vice President and Dean for

Academic Affairs indicating termination of the contract.

2. Any faculty member receiving said letter terminating his contract may, within ten (10) days of receipt of said letter, initiate the following:

Request and receive, within ten (10) days, an appointment with the President (and other concerned parties whom the President and faculty member agree should attend) appealing termination action.

Upon failure to receive satisfaction of his appeal to the President, the faculty member may, within ten (10) days, request a heaRing before the members of the board of Trustees. Said hearing will be granted at the next regular meeting of the Board of Trustees or earlier, at the discretion of the Board.

MISSISSIPPI COUNTY COMMUNITY COLLEGE
P.O. BOX 1109
BLYTHEVILLE, ARKANSAS 72316-1109

October 20, 1993

Dr. T.M. Viswanathan
3405 Wilshire Boulevard
Apartment 103
Wilmington NC 28403

Dear Dr. Viswanathan:

Your letter of September 21, 1993, requesting a hearing before the Board of Trustees and setting forth other information was presented to the Board at its meeting on October 13, 1993.

At an earlier meeting of the Board, your complaints with regard to salary, objections and disagreements with our procedures, your employment eligibility status, and other issues raised by you were given full and complete consideration by the Board.

You are advised that the Board of Trustees saw no reason to disagree with

the College Administration's decision not to offer you a contract for 1993-94. Our President's letter to you of September 8, 1993, accurately reflects the position of the Board. Therefore, your request for a meeting with the Board of Trustees was denied and we consider the question of your 1993-94 contract closed.

Very truly yours,

Bill E. Ross
Chairman, Board of Trustees

BER:lc

CERTIFIED RETURN RECEIPT REQUESTED

MISSISSIPPI COUNTY COMMUNITY COLLEGE
P.O. BOX 1109
BLYTHEVILLE, ARKANSAS 72316-1109
Drawer 1109

Office of the President

September 8, 1993

Dr. T.M. Viswanathan
3405 Wilshire Boulevard
Apartment 103
Wilmington NC 28403

Dear Dr. Viswanathan:

This is in response to your September 3, 1993, request for a meeting with me to

appeal the decision of the College not to renew your contract. Your contract for the 1993-94 contract year was conditional upon continued immigration Naturalization Service certification of employment eligibility. It was not possible to obtain this certification. The College's application for your H1-B non-immigrant status for the 1993-94 term was disapproved by the U.S. Department of Labor because the College's salary did not meet the "prevailing wage" as determined by the Alien Labor Certification Division of the Arkansas Department of Employment Security.

All this and your various objections and disagreements with this procedure have been the subject of extensive and well-written correspondence from you -- all of which I have already carefully reviewed and considered. In addition, you have filed an employment discrimination charge

with the U.S. Equal Employment Opportunity Commission, and this will provide an additional review of the College's personnel actions in your case. Lastly, this matter has been reviewed by the Board of Trustees, to whom we report, and they see no reason to take any further action.

In all candor, there are no issues that you have raised which have not been painstakingly considered by the College. Therefore, we cannot see where the meting you now request would be cost or time effective for either party or would result in any change in the positions of the parties; consequently, we consider the matter of your 1993-94 contract closed.

Sincerely,

John P. Sullins
President

JPS:lc

Certified/Return Receipt Requested